No. 316.

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Brief and Argument of Appellants.

Brief of White for Appellant

Supreme Court of the United States

Filed Feb. 28, 1898.

October Term, 1897.

No. 316.

THE MISSOURI, KANSAS AND TEXAS TRUST COMPANY,

Appellant,

vs.

THEODORE M. KRUMSEIG AND LOUISE KRUMSEIG,

Appellees.

WILLIAM C. WHITE,
Attorney for Appellant

DULUTH.
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1898.

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THE MISSOURI, KANSAS AND TEXAS TRUST COMPANY,

Appellant,

vs.

THEODORE M. KRUMSEIG AND LOUISE M. KRUMSEIG,

Appellees.

STATEMENT.

The facts in this case are as follows: That at Duluth, Minn., on September 5th, 1890, the appellees, Krumseig, executed to the appellant their ten several promissory notes, each for the sum of $360.00, and all payable in monthly installments of $30.00 each, and each of the one hundred and twenty (120) monthly installments drawing ten (10) per cent per annum interest after due: and that to secure the payment of said notes, said respondents executed to appellant a mortgage on certain real estate situated in Duluth, Minnesota. (Transcript of Record, folios 3½–6), that the consideration for the promissory notes and mortgage aforesaid was the sum of $2,000.00 loaned to respondents (Transcript, folios 41, 64), interest upon said sum from the date of the loan until maturity of the promissory notes, and that por-

tion of the mortgage in the following words: "And it is further understood by and between the parties of the first part, their executors, administrators or assigns, and the party of the second part, the Missouri, Kansas & Texas Trust Company, that in case the said Theodore M. Krumseig, one of the said parties of the first part, should die after the execution and delivery of said notes and this mortgage and within ten years thereafter, each and every of said notes remaining unpaid at the said date shall be surrendered to the executors or administrators of the said Theodore M. Krumseig, one of the parties of the first part, and this mortgage shall be cancelled and satisfied; provided however, that the said parties of the first part have promptly paid each monthly installment which shall have become due prior to his death, according to the terms of said notes hereinbefore mentioned, and that he has not committed suicide within two years, and has not, without the written consent of the said party of the second part, visited the Torrid Zone or personally engaged in the business of blasting, mining or submarine operations, or in the manufacture, handling or transportation of explosives, or entered into the service of any railroad train or on a steam or sailing vessel for two years." (Transcript, folio 5.)

The application for the contract in question is found on pages 41–42 of the Transcript, and at folio 48 contains the following provision: "In consideration of the above premises I agree to execute and deliver to the said company 10 promissory notes, each of the sum of $360.00 payable in monthly installments of $30.00, commencing at date of signing contract. The said notes cover principal sum loaned, interest and cost of guarantee to cancel debt in case of death, and shall be secured by good and sufficient deed of trust or mortgage executed by myself and wife on said ground and improvements.

"The contract hereafter to be entered into, if my application should be accepted and contract entered into in writing between myself and said company, shall provide that the mortgage or deed of trust given to secure the above

notes shall contain a clause guaranteeing, in case of my death before payment of any unpaid installments, a release of unpaid portion of debt, if I shall have promptly paid previous installments and kept other conditions.

"As part of foregoing condition, I agree, before acceptance of this application and the execution of said contract, to pass such medical examination as may be required by said company, and to pay said company the usual fee of $3.00 therefor; and to pay all fees for recording deed of trust or mortgage."

The appellee, Theodore M. Krumseig, passed the medical examination conditioned in the application and paid three dollars fee therefor(Transcript, folios 26 and 39); said medical examination was submitted to the Prudential Life Insurance Company of America, of Newark, New Jersey, and upon favorable report said Life Insurance Company contracted with appellant to insure appellant's insurable interest in the life of appellee Theodore M. Krumseig during the life of the contract. See policy and contract (Transcript, pp. 30 and 41.) Appellant was not a Building and Loan Association (Transcript, folios 51–52). Appellant never complied with the laws of Minnesota regarding the transaction of life insurance business in that state by foreign corporations (Transcript, folio 26).

I call the attention of this court to statements of fact in this case that are nowhere rebutted and are conclusive:

1. The expert witnesses agree that the "contract of perpetual forbearance" if death occur, which is coupled with the loan contract in this case is *not a life insurance contract.*(Transcript. folios 6-7, 67–68, 98–99, 103–105.

2. With each $1,000.00 of loan the contract gives the borrower the exact equivalent in effect to him, however, of a ten-year, non-participating endowment policy of life insurance, in the sum of $1,000.00; and repayment of loan, interest and indemnity *together cost borrower $180.00 per year.* (Transcript, folios 55, 57, 61, 62, 65, 66, 74, 89–92, 96–98, 103–105.)

3. A similar loan at 10 per cent interest, with equivalent benefits to borrower by endowment life insurance, would *together cost borrower $191.76 and upwards per year.* (Transcript, folios 56–57, 60–61, 65–68, 74, 78–80, 82–84, 89–92, 96–98.)

4. It follows that, allowing endowment rates for the equivalent 'contract of perpetual forbearance," *Krumseig paid less than 8 per cent per annum interest for his loan.* (Transcript, folios 78, 80–81.

ASSIGNMENT OF ERRORS.

I maintain that the decision herein was erroneous:

I. Because there was no equity in appellees' case entitling them to relief;

II. Because it is not sustained by the evidence and is contrary thereto;

III. Because it is contrary to law;

IV. Because it should have been rendered instead in favor of appellant, dismissing appellees' complaint.

BRIEF OF ARGUMENT.

I.

Respondents are seeking to obtain what they call equity from the court, in a decree setting aside and annulling their contract with appellant, for the repayment of money borrowed and interest and the price of the indemnity feature of the contract, on the ground that the exactions thereof constitute usury and are unlawful; and yet, in a court of equity, they have made no offer to repay the loan with *lawful* interest.

The maxim is an old one, and of frequent application, "*He who seeks equity, must do equity;*" and the first application of this maxim by text-book writers is to just such cases as the present one is claimed by respondents to

be; cases where a borrower of money upon usurious interest seeks the aid of a court of equity in cancelling the instrument; he can obtain his remedy only upon condition of repaying the sum justly and equitably due to his creditor—the amount actually loaned and legal interest.

1 Story's Eq. Jur. (10 Ed.) §642
Pomeroy's Eq. Jur., §§ 391, 937.

It is believed that the highest court of every state of the United States which has a usury law, with the exception of New York, Arkansas and Minnesota, has followed this rule, so that Tyler in his work on usury, says: "The invariable rule in equity is, that a bill or other proceeding in equity, to set aside or affect a usurious contract, whether filed for the relief or discovery, or for both, cannot be maintained without paying or offering to pay the amount actually loaned."

Tyler on Usury. 435.

The following are a few of the cases in our state courts in which the rule that "He who seeks equity must do equity," has been followed; only one of the leading cases in any state being cited.

Rogers vs. Torbut, 58 Ala., 523, 525.
Ruddell vs. Ambler, 18 Ark., 369. (Under State Law.)
Pickett vs. Merchants' Nat. Bank, 32 Ark., 346, 364. (Under U. S. Law.)
Campbell & Jones vs. Murray, 62 Ga., 86, 96.
Cushman vs. Sutphen, 45 Ill., 322.
Conner vs. Myers, 7 Blackf. (Ind.) 337.
Morrison vs. Miller, 46 Iowa, 84, 86.
Jordan vs. Trumbo, 6 Gill & Johns. (Md.) 103, 106.
Eiseman vs. Gallagher, 24 Neb. 79, 82.
Giveans vs. McMurty, 16 N. J. Eq. 468, 473.
Ballinger vs. Edwards, 4 Ired. Eq. (N. C.) 449, 452.
Pickett vs. Pickett, 2 Hill Eq. (N. Car.) 470, 473-4.
Shelton vs. Gill, 11 Ohio, 417.
Sporrer vs. Eifler, 1 Heisk. (Tenn.) 633, 636.
McDaniels vs. Barnum, 5 Verm. R. 279, 292.
Reitz vs. Foeste, 30 Wis., 693, 695.

The rule of equity has also been followed by the United States Supreme Court and the various Federal Courts, until the decision in this case.

Tiffany vs. Boatman's Institution, 18 Wall., 375, 385.
In re Hoole, 3 Fed. Rep., 496, 500.

Matthews vs. Warner, 6 Ib., 462, 465-6.
Nouman vs. Peper, 24 Ib., 403, 404.

The cases cited supra are from states and under laws where certain penalties are enacted for usury not only, but also from others where the entire contract is declared void for usury, as in Minnesota. Revert now to the New York and Arkansas decisions.

Under the laws of New York state as existing prior to the enactment of Chap. 430, Sec. 4, Laws of 1837, the decisions uniformly upheld the rule for which we contend. The leading case prior to that law was the case of Fanning vs. Dunham. The law of New York at that time voided the contract as does the Minnesota law, and there the court held, that when the borrower sets up usury as a defense to an action on the usurious contract the securities will be declared void and ordered to be delivered up and cancelled; but where the borrower files a bill in equity for relief, he must, before he is entitled to relief, pay or offer to pay the principal and interest lawfully due.

Fanning vs. Dunham, 5 Johnson, Ch., 122, 142-4.

The decision was followed in all the courts of that state until the enactment of the law of 1837, when a new departure was taken, and it was decided that the borrower might come into a court of equity thereafter and seek relief from a usurious contract, without offering to make any re-payment whatsoever.

Livingston vs. Harris, 11 Wend. 329.
Williams vs. Fitzhugh, 37 N. Y., 444, 448-456.

We need not look far to discover the reason for this change of base in the state of New York, or to discover that the reason exists alone in that state. The court in the case of Williams vs. Fitzhugh, supra, discusses the reason fully, and I quote from the opinion of the court on pages 452, 453, 454.

After stating on page 452 that "It is familiar doctrine in courts of equity that 'he who seeks equity must do equity,' and without that the court of equity will not extend its arm for the relief of the suitor"; and on page 453, that "It cannot be doubted that when a party comes into a

court of equity to remove a cloud upon the title to his land, he must do whatever is equitable that he should do before the court will interfere"; the court asks, "On what ground is the plaintiff in this case entitled to have his mortgage set aside without qualification or condition? Why should he not do equity? Why should he not pay to the defendant what he in fact received?"

On page 454 these questions are answered in these words: "The answer, and the only answer, which is or can be suggested, is that our statute declares (Laws of 1887, Chap. 430, paragraph 4), that whenever any borrower of money, goods or things in action, shall file a bill in chancery for relief or discovery, or both, against any violation of the provisions of the title of the statutes, concerning the interest of money, or of this act, it shall not be necessary for him to pay, or offer to pay, any interest or principal on the sum or thing loaned, nor shall any court of chancery require or compel the payment or deposit of the principal sum or interest, or any portion thereof, as a condition of granting relief, or compelling or discovering to the borrower, in any case, usurious loans forbidden by the said title or this act."

Williams vs. Fitzhugh, supra.

Mark the emphatic language of the court, that "*the answer, and the only answer possible*, to the question why the equity rule is not applied in that case is, that the statute then in force had expressly provided that it must not be applied. Therefore, in commenting on the New York change of front, the Supreme Court of Nebraska said that in Nebraska 'cases decided under that statute are not applicable.'"

Eiseman vs. Gallagher, 24 Neb., 79, 82.

And the Supreme Court of Wisconsin, where the statutes at the time existing provided that in an action for discovery on a usurious loan, it should not be necessary to pay or offer to pay interest, nor should the court require the payment or deposit of the principal sum as a condition of granting relief; decided that as the legislature had not extended this provision to cover bills filed for relief as well as

discovery, the New York decisions had no applicability in cases where relief against the usurious contract merely was sought, and applied the rule that "He who seeks equity must do equity."

Reitz vs. Foeste, 30 Wis., 693, 696.

The Circuit Court of Appeals in this case (Transcript, folio 129) called attention to the Arkansas statute, but did not take the trouble to call attention to any Arkansas decisions. It will be noted that in the early days in Arkansas, and both under state and United States law, it was decided that the common law rule applied that "He who seeks equity must do equity"; and this was under a law that made the usury contract void. That doctrine was consistently maintained by the Supreme Court of Arkansas down to the years following the enactment of the law of 1887 in that state: See cases cited supra.

Anthony vs. Lawson, 34 Ark., 628.
Grider vs. Driver, 46 Ark., 50, 64.

In 1887, however, the legislature of Arkansas passed a law more sweeping in its provisions than even the law of the state of New York, and which declared in terms that every conveyance or lien given to secure a contract "may be cancelled and annulled at the suit of the maker of such usurious contract or his vendees, assigns or creditors"; and in terms provides, that "neither the maker of the usurious contract nor his vendees, assigns or creditors * * * shall be required to tender or pay any part of the usurious debt or interest as a condition of having such contract and any conveyance, mortgage, pledge or other lien given to secure its payment or executed in furtherance thereof, enjoined cancelled and annulled, and any rule of law, equity or practice to the contrary is abrogated."

Sandall & Hill's Dig. Stats. of Ark., 1894, Chap. 110, Secs. 5086, 5088.

This law is too square-toed to need any interpretation. Commenting upon it, the Supreme Court of the state of Arkansas says: "The legislature thought that the public interest would be advanced by permitting the borrower, though the beneficiary of the illegal contract, to sue for

full relief, untrammeled by any rule of law or equity. That is the purport of the act. It authorizes the borrower to sue for the cancellation (among other things) of any conveyance executed to secure the performance of a usurious contract, and the delivery of possession of any lands held by virtue of the conveyance; and provides that he shall have relief without being required to pay any part of the usurious debt or interest as a condition thereof. It follows that neither his participation in the illegal contract, nor the turpitude of his conduct in appropriating the money of the lender, is any restraint upon his right to relief. The policy of the act rests with the legislature."

Lowe vs. Loomis, 53 Ark., 454, 457.

Aside from the state of Minnesota, this is the only state besides New York whose Supreme Court has decided that the equity rule has been abrogated, and the reason is the same in the state of Arkansas as in the state of New York for so deciding. As emphatically or more emphatically in this case than in that could the court answer the question of equity with the statement that the only possible answer to the question why the equity rule is not applied in Arkansas, is that the statute in force in Arkansas has expressly provided that it must not be applied.

The United States Circuit Court for the district of Massachusetts in a case involving the usury law of the state of New York commented upon that law and its application in the courts of equity of other states and the United States as follows: "One who seeks relief in equity on this ground (that a usurious contract is void) must first offer to repay the money actually lent. As a general proposition this is admitted; but there is a statute in New York which authorizes the borrower to obtain such a surrender, in equity, without payment. * * * * * * * The statute of New York, which authorizes a borrower to obtain a cancellation of securities without payment, cannot bind a court of equity out of the state, and does not undertake to do so. When a borrower comes into equity in Massachusetts, or in the circuit court, he must do equity, as

understood by the court in which he sues. If, then, the defendants held the notes for which the bond and mortgage are said to have been given, and if they were so given, there could be no redemption without payment."

Matthews vs. Warner, 6 Fed. Rep., 461, 465-6.

The position of the courts outside of the state of Minnesota, I believe, to be entirely consistent. In New York state as well as in Arkansas the reason for denying the application of the rule of equity is the express abrogation of that rule in equity cases; and even then, the New York rule is denied application in at least some of the Federal Courts, in cases involving the New York law. Has then the state of Minnesota any statute similar to those of New York and Arkansas to justify it in declaring the equity rule abrogated in this state? I look in vain for any such enactment of its legislature, or anything at all similar, and I am unable to escape the conclusion that the Supreme Court of the state of Minnesota, in its former decisions, has entirely mistaken the scope of its own statute.

Without stating fully the existing usury law of Minnesota (Chap. 66, Laws 1879), it is sufficient to say that Section 1 provides for an interest rate not to exceed ten per cent; Section 2 provides that where more than lawful interest has been paid, "the full amount of interest or premium so paid, with costs," may be recovered in an action brought within two years, one-half to be paid to the use of the common schools; Section 3 provides that all usurious contracts shall be void, etc.; Section 4 provides for the filing by a borrower of a complaint for discovery of any sum, etc., paid in violation of the usury law, and compels answer thereto under oath; Section 5 relates to evidence in usury cases; Section 6 reads: "Whenever it satisfactorily appears to a court that any bond, bill, note, assurance, pledge, conveyance, contract, security or evidence of debt, has been taken or received in violation of the provisions of this act, the court shall declare the same to be void, and enjoin any proceedings thereon, and shall order the same to be cancelled and

given up"; Section 7 repeals inconsistent laws and especially Section 1, chapter 15, Laws of 1879.

General Laws 1879, Chap. 66.

This covers Minnesota's usury law as now existing, and as existing ever since the contract under consideration was made. The only provision that could be construed or misconstrued as doing away with the equity rule is the above stated section 6; and an inspection thereof shows at a glance that it is only in case of a proceeding on usurious contract to enforce the same, that the courts will enjoin the lender; it does not attempt to provide that a court of equity shall not administer equity, if a remedy is sought by the borrower, on that side of the court. It does render the contract void, but that is true in other states from which we have cited earlier—Arkansas, Tennessee, Vermont, etc., and see 18 Wall., 375, 385.

That the equity rule is not sought to be abrogated by the 1879 law of usury is shown by another fact. The 1879 law is in all essential features the same as the law of 1877, excepting that it reduced the legal rate from twelve per cent, as in 1877, to ten per cent. Section 6 of the law of 1877 is identical with Section 6 of the law of 1879.

General Laws, 1877, Chap. 15.

Yet with this same law on the statute books of the state of Minnesota, the legislature of that state in the year 1878 enacted a law, one section of which (Laws of 1878, Chap. 53, Sec. 24) reads as follows: "That the mortgagor, his heirs or assigns, at any time within one year after foreclosure, may recover from the owner of the mortgage at the time of the foreclosure three times the amount of any costs or disbursements not absolutely paid for said foreclosure, and three times the amount of any bonuses or interest over and above twelve per cent embraced in said foreclosure, and for which the property was sold, unless said overplus has been paid to the mortgagor or to his assigns." This law remains on the statute books today, unaltered.

Laws of 1878, Chap. 53, Sec. 24.

Why enact this section of Chapter 53, Laws of 1878, if the Supreme Court of Minnesota was correct in its inter-

pretation of the usury laws, in the case of Scott vs. Austin (36 Minn., 460, 465)? If a court of equity would interfere, to give the borrower a cancellation of his securities because of the contract being void, it would equally have the right to set aside the sale under foreclosure of those securities and cancel them, in an action therefor, and there was no necessity of extending to the mortgagor a less potent remedy than that already his—a penalty covering triple interest, where he had the right to both interest and principal.

Far be it from me to contend that an equity rule may not be abrogated by a legislature; my sole contention is that it has not been so abrogated in this instance, and that this fact will be shown by a more careful perusal of the statutes of the state in connection with the decisions of other states having similar statutes.

The contention of the court in the opinion on the rehearing of the case of Scott vs. Austin (36 Minn., 460, 465), founded upon the final provision of Section 3 of the usury law, might seem to have some force; but it seems to me that that provision was enacted for a very different reason from that suggested by the court in that opinion. Section 3 provided usurious contracts should be void except as to bona fide purchasers of negotiable paper in good faith for a valvable consideration before maturity, with other provisos, and with the proviso in question that "where the original holder of a usurious note sells the same to an innocent purchaser, the maker of said note shall have the right to recover back from said original holder the amount of principal and interest paid by him on said note."

Now, there is no question but what, under Section 6, if the original payee undertook to enforce the usurious contract by a proceeding in the courts, whenever it satisfactorily appeared to the court that there was a taint of usury the court would, in such proceedings, enjoin the collection and order the contract cancelled; but this would be impossible in case of suit by an innocent purchaser before maturity. The purchaser in such a case could collect with no danger of his proceeding being enjoined, and the maker of

the note would in each instance, by the sale to a bona fide purchaser, have lost the statutory remedy intended to be provided him; consequently the legislature added to the former section a provision to cover that case, and it seems very manifest to me that the final proviso of Section 3 cannot fairly be extended beyond such a case in its application.

If this is not a fair interpretation of that proviso, wherefore the enactment of the second section of that statute, which in terms provides that every person who shall have paid usury may recover as against the recipient of the usurious payment the amount of interest so paid? I do not believe that it was the intention of the legislature that, where a debtor had actually paid money upon his moral obligation, or even in excess of his moral obligation, he could recover back from his payee anything more than the excess payment; and I certainly do not believe in extending the application of laws of this class beyond the necessity imposed by the strictest rules of construction.

But further than this, it has been universally held by this court that "the jurisdiction in equity is confided to the circuit courts, to be exercised uniformly throughout the United States, and does not receive any modification from the legislation of the states, or the practice of their courts having similar powers."

Green's Adm'x vs. Creighton, 23 How., 90, 105.
Clark vs. Bever, 139 U. S., 96, 103.
United States vs. Howland, 4 Wheat., 108, 115.
Robinson vs. Campbell, 3 Wheat., 211, 222.
Payne vs. Hooke, 7 Wall., 425, 430.
Kirby vs. Lake Shore Railroad, 120 U. S., 130, 137.
Arrowsmith vs. Gleason, 129 U. S., 86, 98, 99.

In Payne vs. Hooke, supra, the court said: "The equity jurisdiction conferred on the Federal courts is the same that the High Court of Chancery in England possesses; is subject to neither limitation nor restraint by state legislation, and is uniform throughout the different states of the Union."

In Kirby vs. Lake Shore Railroad, supra, the court said: "Their jurisdiction in equity (that of the Federal Courts)

cannot be impaired by the local statutes of the different states in which they sit:" and it adopted the language of Mr. Justice Curtis, "The equity practice of the courts of the United States is the same everywhere in the United States, and they administer the same system of equity rules and equity jurisdiction throughout the whole of the United States without regard to state laws."

In Arrowsmith vs. Gleason, supra, the court said: "We have repeatedly held 'that the jurisdiction of the courts of the United States, over controversies between citizens of different states, cannot be impared by the laws of the states which prescribe the modes of redress in their courts, or which regulate the distribution of their judicial power.' If legal remedies are sometimes modified to suit the changes in the laws of the states and the practice of their courts, it is not so with equitable," repeating the dictum of the court in the case of Payne vs. Hooke, supra. And in United States vs. White, 17 Fed. Rep., 561, 565, the Circuit Court for the District of California declared that "It is a universal rule in equity never to enforce either a penalty or forfeiture."

Under such holdings of the United States Supreme Court, it seems to me that the Circuit Court was right in its ruling in Mathews vs Warner, supra, and that whatever may be the practice or the statute in Minnesota, and whatever its construction by the courts of that state, the statute cannot bind a court of equity outside of the state, or a Circuit Court of the United States sitting in equity in a controversy between citizens of Missouri and Minnesota. It seems to me further, that in the interest of that uniformity of decision, which is broken only in this one instance as shown by an examination of the cases, the United States Circuit Court of appeals should be reversed in this case and the equity rule upheld.

II.

The remaining assignments of error may be considered together; for the question whether or not the evidence sup-

ports the findings and decision of the trial court, and whether the decision is within the law (the rules of equity aside) depends upon the answer to the further question, whether the evidence supports a finding of usury, or of unauthorized life insurance.

Thus far I have discussed the question of the right of appellees to be heard at all in this matter without first offering to pay back that which they had received. I am most anxious however that the entire question of the rights of the parties, regardless of the question of equity, be reviewed in this court; and this I ask in the interest of all the parties and for the purpose of avoiding further vexatious litigation. Thus far there have been decided in the state and Federal Courts three cases involving a similar contract to this, and in which the Missouri, Kansas & Texas Trust Company, this appellant, was one of the parties, and several others are pending.

M., K. & T. T. Co. vs. McLachlan, 59 Minn., 468.
Krumseig vs. M., K. & T. T. Co., 71 Fed. Rep., 350.
Same vs. Same, 77 Fed. Rep., 32.
Mathews vs. Same, 72 N. W. Rep., 121.

In the McLachlan case, supra, the court probably decided correctly upon the facts as presented; in the Krumseig case in both courts, and in the Mathews case in the state court, the decisions were erroneous, for the reason that they followed the McLachlan case as a precedent, basing their conclusion upon the conclusion of the state court in the McLachlan case, for the reason that the contracts are similar; and as I believe, without a sufficient consideration of the difference between the evidence in all the other cases and that in the McLachlan case; for the contract can only be properly interpreted in the light of the evidence adduced.

In the McLachlan case, we were unfortunate enough to have acted on insufficient information, and consequently facts were stipulated that lead the court to an erroneous conclusion.

This was through no fault of the court, and probably through no fault of counsel, but resulted from a misunder-

standing of the nature of the contract.

This misunderstanding has been corrected in this case, and on the facts as now presented we are entitled to a new construction of the contract. In the McLachlan case we stipulated as a part of the facts that the ordinary cost of carrying life insurance for the amount and for the time represented by the contract in question at the age of the defendant in that case was $852.91 for a ten year contract, whereas it appeared that the charge that was made in excess of the ten per cent allowed for interest in that case was $2,663, and the court concluded that a discrepancy of $1,810.09 between the ordinary cost of straight life insurance and the amount charged by the defendant for its contract of perpetual forbearance in case of death was an excessive charge of that amount, and made as a cloak for usury. We contend, however, that the comparison with straight life insurance is founded upon error, the fact being that the contract for perpetual forbearance in each of these cases is the *equivalent, not of straight life insurance, but of endowment life insurance*. This I will show to the court later in our argument beyond a peradventure, but before doing so I desire to discuss for a moment the law of the case as it seems to me that it should be applied in *any* event.

In order to constitute a contract usurious, four elements must enter in: First, there must be a loan of money; Second, an agreement between the parties that the money shall be repaid at all events; Third, the payment or agreement to pay for the forbearance of the money loaned a greater rate of interest than is allowed by law; and fourth, the intent to take more than the lawful rate of interest.

Tyler on Usury, pp. 92, 96-101, 180-181, 367.

The rule somewhat inaccurately stated by Mr. Tyler on page 96 as to the second constituent of such a contract is more accurately stated on page 367, where it is affirmed upon the authorities considered, "that in order to constitute usury there must be, in the second place, a contract or understanding the money loaned shall be returned

at all events, without substantial contingency or hazard. For, if the return of the principal with interest, or of the principal only, depend upon a contingency, there can be no usury; because that which may never be received cannot be said to be forborne for any given time."

Spain vs. Hamilton, 1 Wall., 604.
Tyler on Usury, page 367.
Truby vs. Mosgrove, 118 Pa. St., 89.

In the last cited case an agreement to pay an unlawful rate of interest upon a debt which by its terms was payable at such a time only as the price of petroleum shall reach $1.15 per barrel was held to depend upon a contingency as to the payment of the principal and to be a good note; although it appeared that between the time of the agreement and the time of bringing suit the market price of the oil exceeded $1.15 and it was not shown that that price was unprecedented or even unusual.

We believe that no case can be found in the books which does not clearly stipulate that the second essential, as hereinbefore quoted, must exist in order to constitute usury in the transaction; yet what can be clearer than that in the event of the death of plaintiff's husband the money loaned was not to be repaid; it was not an agreement for the return of the money at all events. I shall have a little more to say on this subject in connection with the proof of what was actually contracted for.

Again it is said by the court, "It is not enough that the borrower intended to make a usurious agreement, but the intention to take usury must have been in the full contemplation of the parties, not of one party, but of both, to the transaction. There must be an *aggregatio mentium*"

Tyler on Usury, 103.
Condit vs. Baldwin, 21 N. Y., 219.
Lloyd vs. Scott, 4 Pet., 205.

And Tyler goes on to say, "Although more than the legal rate of interest may in fact be reserved or taken, if it appears from all the circumstances of the case that it was not the contemplation of the parties to reserve or take usurious interest the transaction will not be tainted with

usury. There must be an intent to take usurious interest, or, in the language of the law, a corrupt agreement to take it, and therefore the *quo animo* is an essential in all these cases of alleged usury." If it be intended to extend the rule and exclude this *quo animo* as far as the borrower is concerned at least, it must appear as far as the lender is concerned, and a reference to the deposition of the President of the Appellant, Mr. Stillwell, will show just how this contract originated and the intent in originating the same, and that there was no corrupt intent to charge usury in his mind, or in the mind of the company, in making the contract, even had there been an excess of the legal rate charged. (Transcript, p. 77, folios 90-92).

In that event the most that could be claimed by counsel was that there was here an unequal contract entered into, but there is no claim whatever that there was deception or fraud practiced by the defendant. The parties had the right to contract for a legal rate of interest and in connection therewith to make a legal contract for the cost of the accompanying guarantee, and unless such a contract can be shown to be tainted with fraud, it seems to me that it cannot be attacked on the ground of usury under the rules aforesaid; unless, that is, there is evidence of such gross inadequacy of consideration as would itself prove fraud. Mere inadequacy might be a link in a chain, but it would not make the chain unless other links were added.

Battles vs. Loudenslager, 84 Pa. St., 446, 451.
Osgood vs. Franklin, 2 John Ch. Rep., 123.
Christian vs. Fink, 15 Ohio, 600.
LaVasser vs. Washburn, 50 Wis., 201.
Fike vs. Vigers, 2 Drury & Walsh, 267.

In the last cited case the court says that the safe course must be for it not to venture upon acting, and referring to the transaction in that case uses this language: "I feel that this is a very extraordinary transaction; that it creates in my mind strong suspicion that it would be very desirable to have some explanation of it. But, as I have already stated, suspicion is not a ground upon which I can on my own unassisted judgment venture to proceed to set aside the

solemn act of the parties. * * * I am obliged to say that I cannot let my suspicions or my inability to explain this transaction * * * call my conscience into activity for the redress of any fraud which I may be led to suspect."

But we have something better here than a negative case for the appellant, and we have not to rely upon mere failure of proof on the part of appellees. We have a contract here that is so clearly within our right and free from any taint of usury, that it will require but a brief reference to uncontradicted testimony and a brief computation, to establish our claim.

Counsel says that all of our evidence proffered in this case as to "endowment" and comparisons of "endowment" policies, and as to what different people have thought or said of this particular contract are clearly irrelevant, immaterial and incompetent, and that his objections thereto should be sustained, because the contract lies spread before the court, and the court cannot fail to find that it entirely lacks any "endowment" feature. Possibly the court knows all about endowment policies and term life insurance, etc., but I have never heard that these were items of general knowledge that a court would take judicial cognizance of; counsel maintains that we have in one feature of the contract the equivalent in effect of a ten year non-participating life policy; and, on the other hand, I contend that we have the equivalent of a ten-year non-participating endowment policy, in result, to the borrower; how is the court to decide which of our contentions is correct, or whether either is, until it shall have had proved to it just what are these kinds of insurance and in what respects (if any) they are like the guaranty contract in the case at bar? Here was our exact trouble in the McLachlan case; we stipulated as a fact that the cost of ordinary life insurance was thus much, taking it for granted that we had in our contract the equivalent of ordinary life insurance; the court had nothing to do but to make its figures based upon this admission, and finding the cost of ordinary life insurance less than $100, for ten

years on $1,000, while we had charged nearly $100 per year for a $1,000 policy, it concluded that so great a discrepancy was it itself indicative of fraud and a cloak to cover usury.

On the trial of that case the counsel for McLachlan had no occasion to prove the similarity between ordinary insurance and the guaranty feature of our contract, because this similarity was admitted; in the present case, however, he *must prove* that similarity, if it does exist, for the reason that we deny it, and undertake to show this court that the guaranty feature of our contract is exactly the equivalent to the borrower of the endowment insurance provided by regular companies, on the ten year non-participating plan. How on earth any court could decide between us without proof, first, of the nature of the two kinds of insurance, and second, of their result to the borrower, and the comparison thereof with the working and practical results to him of the guaranty feature of our contract, I fail to see; and every particle of evidence that tends to make this clear is decidedly relevant, material and competent.

Counsel says the nature of the contract is the precise question for the court, and that therefore under the rules of evidence there is no room for expert testimony on the very question. Well, look at the evidence and see. Whenever the question, "What is the nature of this contract?" has been asked, it was asked of an insurance expert, and clearly meant,—What is the nature of this contract as interpreted in insurance parlance, and as a basis for comparison with insurance contracts? And every answer given showed the expert's understanding of the question, and was entirely competent; and it will be noted that not one man among them but denied that it had any similarity to ordinary life insurance, and affirmed that it was the exact counterpart in its results, of ten year non-participating endowment insurance. So deposed Mr. Hemperley, Mr. Lunger, Mr. Taylor, all actuaries of prominent eastern companies; so deposed Mr. Stillwell and Mr. Cone, the officers of the defendant and both old insurance men; so also deposed our own home experts, respondents' own witnesses, Mr. Squier and Mr.

Covey, when recalled by me; and so deposed Mr. Mosher, an old insurance man, who acted for the company in making this contract with the respondents; and he added to his statement that the contracts were identical in effect, "I made use of the statement at the time of making loans, that it was in fact the giving of the avails of a policy immediately on the contract being closed, instead of at the end of the ten years period." Transcript, folio 66. So that this was the exact representation made to the borrower when he took the loan, and he must have taken it with that definite understanding.

Either, then, the company misrepresented to him through Mr. Mosher, or they told the truth; if they told the truth, then respondents got just what they bargained for, and the only question left is whether they paid for it an unconscionable amount, from which the court would be at liberty to infer the intent to charge usury.

I do not propose in this connection to review the testimony on this subject, which is voluminous. Mr. Stilwell has told the court very tersely how he conceived this contract, and his exact intent in drawing it, and this evidence was to me very interesting as clearly establishing the direct connection between the contract and the endowment insurance plan.

See Mr. Stilwell's deposition, Transcript, p. 77, folios 90-92.

But Mr. Stilwell and other experts have not only shown the original intent of the designers of the contract; they have also given us the figures from which we may verify their statements; and if the court should see fit to reject every other syllable of their united testimony, the demonstration is so clear that "he who runs may read," and I propose simply to epitomize the results as shown by the figures both of our own experts and those of Mr. Richards; and if these figures do not prove my contention on this branch of the case to a hair, I will submit to defeat without a murmur.

By the results as thus epitomized and tabulated is proved the entire falsity of Mr. Richards' calculation, as submitted to the trial court, and they show beyond the

chance for successful reply, that we have in our contract the exact equivalent in effect and results to the borrower, of the ten year non-participating endowment policy of insurance; that we have these results at a considerably lower figure than they could have been purchased from any insurance company; that the results are free from any contingency whatever and therefore surer than insurance; that in case of the borrower living out the ten years of his contract, it costs him considerably less than would the policy of insurance that counsel contends for; and incidentally that there is therefore no usury here.

In making this comparison, I use for convenience as an example an insurance policy and loan of $1,000 as compared with contract for $1,000 on the part of appellant and appellees; I take the age of 28 as that of the borrower and the legal rate of interest, 10 per cent. For the insurance contracts compared, I use the endowment rate of the Equitable Life Insurance Society, because it is the lowest rate of any testified to and the cheapest insurance on that plan that we can find; and I use the ordinary life figures given me by the testimony of appellees themselves, as probably correct. Following the evidence of the experts, Squier, Covey and Mosher, I shall also compare our contract and its results; first with a loan contract from the Equitable Life to a borrower, coupled with a ten year non-participating endowment insurance policy issued him by the same company; second, with a loan contract between borrower and any other company; third, with a loan made borrower by any individual or corporation and a ten year non-participating life insurance policy. I am quite willing to abide by the results of these figues, all of which must be conceded to be correct, and have been so conceded by both counsel. (See table opposite.)

From the foregoing tables it appears that there is no practical difference in results to the borrower, between the contract of appellant and the contracts for loan with endowment insurance on the plan suggested, excepting the less risk in one case under the appellant's contract, and the more

favorable terms to the borrower in both cases. In the case of appellant, $887.40 of borrower's money was used to pay interest, and the remaining $912.60 went into the company's reserve, and has paid up the principal debt in installments; in case of the Equitable Life, it took $1,000 to pay interest, and the remaining $912.60 went into the company's reserve, to be used at the end of the term in paying up the principal debt. The company did not in this case, however, any more than in the former, pay the principal with its own money; it simply went through the fiction of paying the principal from its endowment fund; in reality the original loan came from its reserve, and the annual payments by the borrower went back into the same reserve, actually repaying the debt in installments as in the appellant's case. The situation is a little different where contracts are made with two companies; but even there the borrower has paid the insurance company in installments, with which to repay him at the end of the term; but in that case he runs a good risk of never getting it back again, which is not true of the others.

As to the fourth method in the comparison, which is that insisted on by respondent's counsel; if for the sake of the argument it were admitted that he could accomplish as good results by that method as by any of the others, does it follow that we must be the losers because we did not follow the best method? It is certainly not the policy of the law to protect a man against foolishly bargaining for more expensive goods than he needs, if he did not get cheated on that which he did buy. And surely if he did actually buy the equivalent of endowment insurance in this case at the same figure he could have gotten such insurance for elsewhere, and saved money on his interest, there has been no very crying fraud to redress. But one thing alone shows the difference between a straight life policy for ten years and what the borrower gets from the appellant under its contract, and that is that under the straight life insurance contract the borrower has got to die to realize; a thing that most people, especially of the age of respondent, object to doing; if he lives out the full term, he has paid, at the best

figures in evidence, $367.60 more for such a loan and insurance than he pays the appellant under its contract, under the same conditions. It is obvious, then, that the straight life contract is in no sense the equivalent of what defendant has given.

It is puerile for counsel to argue that the appellant for each $1,000 of insurance "reinsured" the borrower for about $68.47; charging him greatly more than that, and thereby defrauding him and reaping an unjust benefit. In the first place, appellant's contract with the Prudential Insurance Company of America has absolutely nothing to do with the case; the appellee has no privity of contract with that company, and the two contracts are entirely independent of each other; it is none of the appellee's business, even, whether appellant insured its insurable interest in his life or not. In the second place, the contract appellant got for itself from the Prudential was a different contract from appellee's, and one that would not have been of the same use to him, and moreover was one that appellee could not have obtained for himself in any event, as is shown by the uncontradicted testimony of several witnesses. (Transcript, folios 34, 75, 93.) In the third place, the testimony of appellant shows that in order to obtain this contract with the Prudential, it had to agree to give that company much insurance, to do all the soliciting for such insurance, to collect all the premiums, to run all the risks of collection (paying these premiums itself whether paid by the insured or not) and pay over thus to the Prudential $68.47 per $1,000 of insurance annually, less a small commission, and then run the risk of final collection from the Prudential. It was as though the Prudential Company offered to carry the desired insurance at a very small sum, provided it were not required to hire a single salaried or commissioned officer from start to finish, and had all collections assured to it by valid guaranty.

But in the fourth place, the Prudential Company did not agree to indemnify appellant. If appellee died at the end of the 5th year appellant must in any event pay full

$1,000 to appellee, whereas it would then receive from the Prudential Company less than $500. The last year, on appellee's death, appellant would have repaid him $1,000, and would receive from the Prudential but $70. And this is what counsel wishes to substitute for appellee's contract. The statement of the proposition is sufficient; it is a *reductio ad absurdum*.

Why if appellees had taken a loan at 10 per cent and then themselves contracted (if they could get it) for a reducing policy of insurance, like the Prudential's, and then died in five years, they would have had to pay out on each $1,000, for five years, $500 interest, $49.26 (at Prudential's contract with appellant) for insurance, and would have the principal to pay back, making a total of $1,549.26; thereupon the beneficiary under this reducing policy would be entitled to receive from the insurance company $562.00, and the entire cost to appellees for five years, above receipts under the policy, would be $987.26; whereas the cost under the contract that appellees made with appellant was $900 in five years. No juggling with figures will make any different result than the above, even using the figures of Prudential contract, as counsel desires. Surely counsel cannot be so simple as to think that under this reducing contract of insurance, straight life, the insurance company would pay more than the policy called for, or that it would or could be reducing the amount of his loan in any sum whatever. The loan would remain $1,000 and have to be repaid in full. Similarly, at the end of the ninth year, if appellees could have enjoyed the benefit of the Prudential's contract, reducing at the same rates, they would still owe $1,000, would have paid out at 10 per cent $900 interest and for insurance $69.82, and in case of death the beneficiary would receive $70, leaving as a result $1,899.82 expenditure above receipts, as against $1,620 under our contract. Of course in these figures, I have not considered the original $1,000 which would reduce results just $1,000 under either contract, making nine years cost under ours $620, and under joint one with Prudential reducing straight life policy, $899.82. And

if there were no death, the joint contract with reducing policy at Prudential figures with appellant would cost appellees in 10 years, $1,070.82, as against $800 under our contract. Thus do counsel's own figures disprove his position, taking them at their worst for us; for it is entirely manifest, on a moment's thought, that if appellees borrow money and take out insurance on this reducing plan, their loan remains the same through the years, while their policy reduces.

How, under such a contract or contracts, could the *principal* be reducing? Counsel says the total cost of the Prudential policy ought to govern, and that is $70. Well, if that is true, then also appellant ought not to have more than 10 per cent interest on the loan, or $1,000 total for interest; it would have no receipts from anywhere outside of the foregoing, and the total roceipts to it would thus be in the ten years, $1,070 on each $1,000 loaned. Now if the principal should be reduced each year in the amounts agreed on, it will be paid up in ten years, and we have the astounding result that appellees have paid us straight interest according to law, and for $70 have carried a policy of insurance on the reducing plan and paid up $1,000 of principal. A pretty good result for an expenditure of $70, is it not? Yet this is the point to which appellees' counsel would bring us by his argument. However you put it, it brings us to the same *reductio ad absurdum.* And in the foregoing analysis of appellees' position, is an added demonstration of the fact that the contract we made with the appellees was far different from that we made with the Prudential. Under the contract with appellees for the sum paid us, we must return them full $1,000 in any event, whether death ensued or did not ensue; under the contract with the Prudential, that company must pay us a sum never equal to $1,000 in case of death, and nothing in case of survival.

There seems to be but one other thing to note in this connection in answer to counsel. The foregoing calculations have been made upon the hypothesis that both parties live up to the contract; but counsel has asked, "Suppose borrower default?" Well, suppose he does; is it the duty

of the court to inquire into the consequences of a default in a contract that is entirely legal and proper if lived up to? Certainly not unless in such event some palpable fraud is about to be attempted, and even then, not until the attempt is actually threatened. But let us see.

It does appear that if borrower defaults after first payment to appellant, appellant can sue him and collect $1,620, while under the other contracts he could be sued for only $1,100; but follow this inquiry a little further. If borrower defaulted after the second payment, he would then owe appellant but $1,440; after the third, $1,200; after the fourth, $1,080; and so on in a decreasing ratio of indebtedness, until after the ninth payment he owes but $180; not so with the other companies and contracts; under any of these, if he defaults in any payment, from first to last, he will owe and can be sued for $1,100 with no offset, his non-participating policy being forfeited in case of default; so that it appears that here too the borrower gets the best terms from appellant; the average advantage to him in case of default is actually greater by considerable than under the other contracts, and the court could almost take judicial cognizance of the fact that on all loans it is the first payments that are made promptly, while the later ones are those that are apt to be defaulted.

I find then, that in any light in which this question can be put, we have given the borrower the equivalent of a loan with an endowment policy of insurance and no attendant risk to borrower, for the same terms that he could procure elsewhere, and have charged him less than the legal rate of interest for his money, 8 per cent.

At the first hearing of this case, there were asked several questions which I desire to answer carefully, as to the law of the case. I have compared our contract with contracts in the Equitable and other companies; and the court asked the question, "Conceding that I have here a contract which gives equivalent values, is it legal? Would the Equitable contracts be legal if they were combined in one? Would they be legal (whether combined or not) if in addi-

tion to the legal interest charged, I had exacted the taking of insurance as a condition of the taking of the loan?"

Suppose that I should make a loan of $1,000 at six per cent interest, $60 per annum, and exact as a condition additional to this, that the borrower buy of me a horse for $40. There would certainly be no possibility in that case of predicating usury upon the joint deal, for the interest paid, plus the price of the horse, makes but ten per cent of $1.000, and ten per cent is allowed even for interest; we can say, therefore, off-hand, that the mere coupling of the two contracts (the one for a loan and the other for a sale of anything else) will not constitute the contract entered into illegal on the ground of usury or on any other ground.

But counsel for appellees cited a case from the Circuit Court of the District of Nebraska, which he says decides that the intermingling of a loan contract and an insurance contract will be regarded as an attempt to evade the usury laws by exaction of something besides interest, and which counsel says is conclusive against us.

Missouri Valley I. Co. vs. Kittle, 2 Fed. Rep., 113 (1 McCrary, 234).

Let us see about this. In that case, the plaintiff made a loan at the highest legal rate, 12 per cent, to a party that did not desire or apply for life insurance, and in addition to the exaction of 12 per cent interest, compelled the borrower to take with it an insurance policy on his life, as a condition precedent to and additional consideration for the loan made.

The court holds that it is to be supposed the company made a profit on its life insurance contract, and as the highest legal rate had been otherwise contracted for and reserved, the agreement for this additional compensation for the loan was usurious; it was highest legal rate and something more.

That is a very different proposition from the one in the case at bar, or from that suggested by the court's questions. In our case, we have shown that the lowest insurance procurable in the United States under contract equivalent to ours in results to the borrower would cost $91.26 per $1,000 per annum; and for equivalent (and in many cases better) results, we are entitled to charge the same rate. That

leaves the contract price paid, only $88.74 per annum for interest on $1,000, or about 8.9 per cent, whereas the highest legal rate was 10 per cent in this state; and in the case at bar it appears from the only evidence on the subject (that of Messrs. Stilwell and Cone) that there was actually loss on this business (Transcript, folios 94, 100), and it certainly does not appear that there was a gain of any kind that would make the amount of net gain on the whole transaction run up to 10 per cent per annum, if we were to take the Nebraska case as law and carry its conclusions to the utmost possible limit. This case does not come within the rule laid down in 2 Fed. Rep. 113.

We have fortunately several other cases on this question, and the very first one is a case from the District of Iowa, reported in the 2d of McCrary, and in which the opinion is written by the same judge who wrote the opinion in the foregoing Nebraska case (Judge McCrary). It shows clearly the ground of his opinion in the two cases to be just what I have stated, and establishes the rule to be, that where, as a condition of making a loan, the borrower is required to take a life insurance policy from the lender, and pay premiums thereon, in addition to the highest legal rate of interest on the amount loaned, the profit thus derived is equivalent to additional interest, and therefore usurious. It is doubtful if all courts would go to this extent, but it is certain that they will not and cannot go further.

Nat'l Life I. Co. vs. Harvey, 2 McCrary (U. S. Circuit), 576.
See also Miller vs. Life Ins. Co. of Virginia, 24 S. E. Rep., 484.
Utica Ins. Co. vs. Cadwell, 3 Wend., 296, 301.
Washington Life I. Co. vs. Paterson Silk M. Co., 25 N. J Eq., 160.
Homeopathic M. Life I. Co. vs. Crane, 25 N. J. Eq., 418.

The foregoing cases are all illustrative of our contention and of the rule invoked, though the courts do not in some of them go even as far as in the cases decided by Judge McCrary; the New York and New Jersey cases holding that conditions of this character are not *per se* usurious in event even of the highest legal rate being charged but depend upon the real intention of the parties.

In the case in 3 Wend., 296, the borrower was required

to make a note with sureties (which it seems drew the highest legal rate, 7 per cent) and to effect an insurance on a dwelling house. The court held that this was not a usurious contract; as the insurance "was made at the usual rates of premiums, there could be no shift or contrivance in this transaction whereby the defendants were made to pay more than seven per cent interest on the loan made."

Utica Life Ins. Co. vs. Cadwell, 3 Wend., 296, 301.

Think of it; I suppose every loan made nowadays upon property in our large cities on which there are buildings whose burning would materially lessen the security, even where made at the highest legal rate, is made upon condition that policies of insurance be given the loaner as additional collateral. Many of these loans are made by our large insurance companies, and the collateral fire insurance is taken out by themselves in their own company. Would it be held that the fact of their making a profit on their insurance policy in addition to the highest legal rate on the loan, constituted the double contract usurious? Counsel will say that this is life insurance in the case at bar; but I fail to see where that makes a difference in the principle involved.

But take the New Jersey cases then, where (in both cases) life insurance policies were exacted as one condition of the loan, policies to be taken from the company making the loan. In the first case, the loan was made at highest legal rate, 7 per cent, and the evidence did not show conclusively whether the taking of the policy of insurance on his life was a condition precedent or not; but the court says, "If it be admitted that it was a condition of the loan, it is not evidence of a usurious agreement. The policy was taken out at the usual rate, and there is no evidence whatever, that it was designed as a cover for unlawful interest."

Washington Life, vs. Paterson Silk M. Co., 25 N. J. Eq. 160.

In the last cited case, 25 N. J. Eq., 418, a loan was made to John R. Crane, at legal interest to the limit of 7 per cent, upon condition that his son take out a policy of *endowment insurance* for five years of $8,800, and pay a prem-

ium therefor of $2,009.38 per annum payable half yearly, that being about the yearly premium for endowment insurance usually charged by insuramce companies. The court said, "In the present case, the taking out of the policy was made a condition to the procurement of the loan. The circumstance is not denied by the complainants, but whatever criticism it may expose their business methods to, it can hardly be contended, by itself, to make the bargain a usurious one. * * * I am satisfied upon a careful consideration of the evidence in this case, that usury is not proved by it. Where a policy is issued in good faith, at the fair and customary rates, as part of a general operation, wherein a loan to the policy holder is the other part, I see no reason to question the legality of the loan, even though it depends on the taking out of the policy. It is a question of *bona fides*, and must be so dealt with. The expediency of it as a business transaction is one thing; the legality of it is another."

Homeopathic Mut. Life I. Co vs. Crane, 25 N. J. Eq., 418.

I contend that this rule of bona fides in such cases as this is the proper rule, for the reason that the actual intent of the parties is alwaays laid down in the books as one of the essential elements in the proof of usury; but whether the court holds this the true rule, or that the rule as laid down by Judge McCrary is the correct one, the present case comes within the rule in either event.

I contend further, that the results of our contract to the borrower are at every point and at all times the same as would be a contract of endowment insurance, and that if we have sold what is as good for him as endowment insurance, we are entitled to charge him therefor at least as much as would be charged for endowment insurance; which being the case, a fair charge to him under that part of our contract was $91.26 per annum for each $1,000 of his loan.

I contend further, that this result being reached, there remains but $88.74 per annum of the consideration, and this is but 8.9 per cent per annum for the loan, and is within the legal rate by more than 1 per cent; that there has been

shown no fraud or bad faith on the part of appellant, and no intent to charge beyond 8. per cent, but that the contrary intent has been shown by the evidence of Mr. Stowell and by all the evidence as to values; and further, and leaving out of question the good faith of the parties, we do not anyway come within the rule that forbids us to exact any other condition of loaning where we have exacted the highest legal rate of interest (if that rule be followed), for we have not done so, and there is here no usury.

III.

This contract is *not an insurance contract*. Counsel for appellees maintained in the trial court that the contract in the case at bar is not *Endowment Insurance*, because the distinguishing feature of that class of insurance consists in the fact that thereunder "at the end of a fixed period of time the insurer will pay the amount of the policy to the insured, who is alive." This is exactly our own contention in the case; it is not endowment insurance for that very reason; there is no agreement to pay back to the plaintiff one cent at the end of a term of years, or at any time; there is no endowment fund heaped up for repaying principal, and therefore there is no endowment insurance; there is simply the *equivalent* of endowment insurance as far as the borrower is concerned, for the reason that the fund is not accumulated with which to repay him his money, but he is paid his money in advance and thereafter does the paying back to the company. It is, as Mr. Taylor has well said in his deposition, "the reverse of endowment insurance," and not endowment insurance. In response to this, counsel said that "things equal to the same thing are equal to each other." True, but it does not follow that things are the same because their effects are the same; otherwise we might on occasion have counsel arguing that an injection and a cathartic are the same.

But let us follow counsel's reasoning a little farther. If this is not endowment insurance, "by the same token" and following the argument to its logical conclusion, it is

not *insurance;* because here the company does not agree at any time to pay plaintiff anything, having paid him everything in advance, while in insurance contracts the distinguishing feature consists in the fact that at a fixed time (so many days after the death of the assured) the company will pay the amount of the policy to his legal representatives. If then, the contract is not endowment insurance, by an exact parity of reasoning, neither is it insurance. Counsel cannot escape the result of his own deductions.

Endowment insurance contemplates the payment at a fixed time to the insured of the face of his policy; the contract in question does not; it is therefore not endowment insurance: straight life insurance contemplates the payment at a fixed time to the beneficiary, of the face of the policy; the contract in question does not; it is therefore not straight life insurance.

Thus much being definitely settled, then, we are entitled to the enquiry, "What is the contract in question?" The District Court for St. Louis County, Minnesota, answered that query in the opinion of the court in the case tried heretofore, of McLachlan vs. this same defendant, involving the merits of a similar contract, and I quote the words of that court, which are admirably chosen to convey the exact definition of the contract: "It is just what its terms indicate, an agreement for perpetual forbearance on the part of the plaintiff if the death occur." And in this connection and as illustrating my contention that there is no life insurance feature in the contract in question, I cannot do better than adopt the language of Robert B. Cone, the Secretary of the Defendant company, in his answer to the question of counsel why this is not life insurance. This is found in a deposition taken in this case at Kansas City, in which Mr. Cone says (Transcript, p. 84, folio 98):

"I don't know what definition a lawyer would give to life insurance, but in the ordinary acceptance of the words, they mean a contract whereby the insurer promises to pay out a certain sum of money upon the death of a person, and Webster so defines it. Under the contract the defendant

does not promise to pay anything upon the death of a person. It delivered to the plaintiff at the beginning all of the money it agreed to deliver to him in any event. It merely promises not to ask a repayment of it in case he dies before he has paid it. It is true that a contract of life insurance and this contract both include a chance of death, but the one is a promise to *pay something* in the event of his death, and the other is a promise to *do nothing* in case of death, but merely an agreement that his death will satisfy the debt. In the case of life insurance the insurance company has in its hands all of the money, and the insured takes all of the risk of losing the premium paid, and the risk of being unable to collect the amount of his policy in case of death; but under this contract the plaintiff takes no risk whatever, he has the money from the start and the defendant takes all of the risk of being able to get it back again; the defendant fully performs the contract on its part in the beginning, and the contract is fully carried out on its part at the outset; there is nothing more for it to do; a complete performance of the terms of the contract depends solely upon the acts of the plaintiff; he gets the money in advance and makes all the promises of future performance, and he does not have to rely upon any promises of the defendant for future performance. It is immaterial to him whether the defendant is solvent or insolvent, and he has no concern in the question as to whether the defendant is ever willing or able to keep its contract, as it will in no event owe him anything; but the reverse is true in case of life insurance."

That Mr. Cone hit very close to the definition given by law writers upon the subject of life insurance, will be seen by comparing the definition with those in the text books.

Walker's American Law, 476.
Black's Law Dictionary.
May in Insurance, Paragraph 8.
13 Am. & Eng. Enc. of Law, 629.

I submit that the Circuit Court of Appeals in quoting from the testimony of appellant's witnesses the statement

of Mr. Stillwell that he invented the plan on which this loan was made, and that it is a "combining the loan and the insurance into one contract;" and of Mr. Cone that "the contract involved in this case is similar to a ten-year loan and a ten-year endowment policy," etc.; and thereupon accepting these statements as a construction of the contract given by appellant's expert witnesses and holding it therefore "a combination of a mortgage loan and a life insurance policy," has reasoned much in the same way as did the Bible student who agreed to prove from scripture that there was no God, and with his thumb over the words "the fool hath said in his heart," pointed out the succeeding statement, "there is no God."

In this slighting way the Circuit Court of Appeals cut out from the language of witnesses, not intended to be technical or exact, certain phrases that by themselves might indicate an opinion on the part of these expert witnesses, which the entire statements made by them showed conclusively that they did not hold. And whatever opinion they held, it seems clear to me that this contract does not come within the definitions of insurance, but is most aptly described by the District Court of St. Louis County, Minnesota, as "an agreement for perpetual forbearance on the part of plaintiff if death occur;" and the appellant had the right to rely upon its judgment and that of the insurance commissioner of the State of Minnesota to that effect.

If this is a life insurance contract, then if the company had sold Krumseig a piece of real estate, taken a mortgage back for a part of the purchase money, and agreed that if Krumseig died before paying off the mortgage it would forgive the debt; that would be life insurance and constitute the company a life insurance company; a proposition too absurd to consider for a moment, but not a whit more absurd than the contention of counsel.

But suppose this were life insurance, pure and simple, it would not follow that we could not collect the amount of our claim under this contract, because we were a foreign company and had not complied with the insurance laws of

the State of Minnesota; even in a law action in which we were plaintiff.

Counsel for appellees in the lower court referred to certain enactments or certain statutes of the State of Minnesota with which he claims that we have not complied, and first, to Sec. 287, Chap. 34, Title 6 of the General Statutes of Minnesota for the year 1878. This section provides that no company hereafter organized in this state shall make insurance upon the lives of individuals, etc., unless organized solely therefor and doing such business exclusively; but the application of this section it is hard to see, for the defendant in this case is not a company organized in this state.

He refers next to Sections 291 and 306 of the General Statutes of 1878, Chap. 34, Title 6, and says that because we did not file with the Insurance Commissioner a copy of our charter or a stipulation as to service of process upon us in the state, we have not complied with the laws of the state. Section 287 is Section 1 of Title 3 of the laws of 1872, and Section 291 is Section 6 of that Title and Section 306 is Section 1 of Chapter 20 of the laws of 1876 and takes the place of Section 21 of Title 3, Chapter 1 of the laws of 1872. Sections 355 and 358 of the General Statutes, Chapter 34, Title 6, are also referred to as requiring a deposit of $100,000 as security for policy holders, and it is contended that as the foregoing sections have not been complied with a contract cannot be enforced which has been made within the state by any foreign insurance company.

In the first place it is doubtful whether the last of those provisions, which are practically superceded by Chapter 225 of the laws of 1889, refer to foreign insurance companies, but if they do it does not follow that if we were an insurance company we would not nevertheless be entitled to sue upon our contract and to enforce the same.

Counsel to support his contention that we would not, quotes from Section 3 of Chapter 76 of the General Statutes of 1878, which provides that "a foreign corporation cannot maintain an action in this state upon an obligation or liability arising out of or in consideration of an act which is

contrary to the law or policy of the state and which is thereby forbidden in respect to corporations or associations therein whose general business is similar to that of such foreign corporations." Assuredly we do not come within the meaning of that statute. That statute provides that we cannot maintain an action on contracts contrary to the law of the state or forbidden by that law in respect to corporations therein whose business is similar to that of such foreign corporation. The meaning of that statute is obvious; if there were any contract by us entered into which a state corporation could not enter into, being forbidden by the law of the state, then we would be within the provisions of the statute, but that is not the case. Foreign corporations have within this state the same rights and privileges and are subject to the same laws as domestic corporations and are deemed domestic corporations and are so legislated by Chapter 183 of the laws of 1885, and among the rights given to domestic corporations is the right to be sued and to sue, etc.

Is Section 3 of Chapter 76 of the Statutes of 1878 is now in force it was enacted not for the purpose of circumscribing the powers of these foreign corporations, but in order that they should not obtain greater rights than domestic corporations, they being legislated to be simply domestic corporations; and the fact of a foreign loan company being permitted to do a life insurance business in this state would not give it a right, privilege or immunity, not possessed by domestic corporations in this state. We believe, moreover, that Section 3 of Chapter 76 of the statutes of 1878 is not now in force and was superceded by Section 6, Chapter 183 of the laws of 1885, and in this opinion Judge Kelley seems to have entirely coincided with us, for in his compilation of the statutes he has left out Section 3 altogether.

As to the claim that appellant not having deposited $100,000 as provided by law for the security of residents of the state, could not lawfully do business here, we maintain that sections of the statutes referred to do not cover the case of the appellant for the reason that the appellant is not within the reason and intent of the law. That law provided

(Chapter 34, Sections 355, 356, 357 and 358), that this deposit shall be made "as security for all its policy holders," whereas no necessity exists for the security of the policy holders, if they be called such, of the defendant. The persons contracting with the defendant had no need of security, for they received their money in advance, were provided with a fund by the company which secured its guarantee, and it could make no difierence to plaintiffs or their representatives whether the defendant failed in business, ceased to do business, sold out, or what happened to it. Not being within the reason of the statute, therefore, the statute could not be held to apply, under the well known rules for the interpretation of statutes. Such seems to have been the ruling of the Insurance Commissioner of the State of Pennsylvania upon a similar contract, as stated by Mr. Hemperly in his deposition, and such also was the ruling of the Insurance Commissioner of our own state, as appears from Mr. Taylor's deposition, on his application to the commissioner. I do not contend that this evidence is competent on this question; but although the court shall not consider it as evidence that would bind the court upon the question, I maintain that it is of use to us in the determination thereof; for the Commissioner is an expert in these matters, placed in position for the purpose of protecting the state and the holders of policies within the state; and his opinion is of great weight, provided there is any question at all as to whether these contracts can be construed as insurance contracts. He is in a *quasi* judicial position, having original authority to determine these questions, and while his decision may not be binding upon this court, it should be as much so as would be the decision of another court. But even if the contract was for life insurance and was made in utter disregard of the requirements of law and defendant was not entitled to do such business in Minnesota; even in that event and in a law court could the respondents, having received all the benefits under it and retained them, attack the contract on that ground? The books are filled with decisions on this question of estoppel on the part of the person

benefited, and I will not go into a lengthy discussion on this point but refer to a few cases.

In the case of Sherwood against Alvis, 3 So. Rep., 307, defendant had secured a loan from a foreign corporation which had not complied with the laws of Alabama regulating foreign corporations doing business in that state; the corporation foreclosed the mortgage, and in an action by the purchaser for possession, the court held the defendant mortgagor estopped from pleading that the mortgage was void for failure to comply with the state law.

Sherwood vs. Alvis, 3 So. Rep., 307. See cases cited in above.
Newburg Petroleum Company vs. Were, 27 O. St., 343.
Am. L. & T. Co. vs. E. & W. R. Co., 37 Fed. Rep., 242.

It is also held by some courts that even where a foreign corporation makes a contract prohibited by the laws of the state, and such prohibition has a penalty attached to it, as is the case in Minnesota, that the penalty is exclusive.

Laws of 1885, Chap 183, Secs. 1, 2, 3, 4, 5 and 7.
Black vs. Page, 6 Ore., 431. See cases cited in above.
Beach on Priv. Cor., Sec. 415.
Fritts vs. Palmer, 122 U. S. 282.
Thornton vs. Nat'l Bank, 71 Mo., 221 and cases cited.

We contend that even if the contract in question was in violation of the statutes of the State of Minnesota, the state alone could complain of it, the contract being an executed one upon the part of the corporation and the defendant retaining all its benefits.

Nat'l Bank vs. Mathews, 98 U. S., 621.
Fritts vs. Palmer, 132 U. S., 282.
Wright vs. Lee, 56 N. W. Rep., 931.

But finally, on this branch of the case, whether or not there were insurance in the contract, and illegal insurance at that, I again assert that respondents are seeking in this case the assistance of a court of equity, and "must come into this court with clean hands." I need hardly further discuss this proposition, or its corollary, that mere illegality in the contract cannot be urged in a court of equity, by one of the voluntary parties thereto. A court of equity will not lend its aid to one who has been in equal wrong with

the defendant, it matters not whether the transaction be intrinsically immoral or a transaction prohibited by statute, as in the case at bar.

This maxim of the law is illustrated in regard to gambling transactions which are clearly prohibited by law and against public policy. It seems to be the rule of the courts, without exception so far as I can find, that the courts will not only refuse to lend their aid for the purpose of enforcing such transactions, but also they will not assist the losing party in setting aside the contracts; the maxim applicable being *"potior est conditio possidentis."*

Kahn vs. Walton, 46 Ohio St., 195, 214.

The court goes on to quote the opinion of the supreme court of Massachusetts in the case of Atwood vs. Fisk, that "the suppression of illegal contracts is far more likely in general to be accomplished by leaving the parties without remedy against each other. And so the modern doctrine is established that relief is not granted where both parties are *in pari delicto.*"

Atwood vs. Fisk, 101 Mass., 363, 364.

In Weakley vs. Watkins it was held that "a court in chancery will not entertain a bill to cancel an obligation, the consideration of which is violation of chastity, the compounding of a felony, smuggling, gaming, false swearing, or the commission of any crime, or a breach of good morals." The court concedes that such an instrument will be ordered delivered up and cancelled when the complainant has been imposed upon and executed an instrument void for fraud, accident, mistake or other cause, which renders it iniquitous and unjust that it should be enforced against him; but conditioned that the plaintiff himself shall not have violated the laws of good morals or knowingly executed an instrument in violation of good morals or express prohibition, either by common or statute law. The one seeking to enforce such instruments by the judgment of a court of law, and the other seeking by the aid of a court of chancery to

have them cancelled, are equally repelled upon reason and authority.

Weakley vs. Watkins, 7 Humph (Tenn.), 356.
Harrington vs. Bigelow, 11 Paige, 349.

In Tuthill vs. Morris the Court of Appeals of the state of New York laid down the rule in these general terms: "The circumstance that a security has become or is invalid in law, and could not be enforced even in equity, does not entitle a party to come into a court of equity, and have it decreed to be surrendered or extinguished, without paying the amount equitably owing thereon.

Tuthill vs. Morris, 81 N. Y., 94, 100.

In Deans vs. Robertson the Mississippi supreme court had before it a promissory note and a deed of trust to secure it, given for goods purchased from a merchant doing business without having paid the tax and obtained the privilege license prescribed by the statute, and which on that account are null and void in the hands of such merchant or his assignee. The condition, as far as the prohibition of the statute and the voiding of the securities are concerned, was the same as in the case at bar. The court decided that a bill in chancery to cancel a promissory note and deed of trust null and void under the provisions of that statute, could not be maintained by the debtor without a tender of the amount for which the note was given. The court says, "that a bill to cancel a contract on the ground of illegality will not be maintained unless it offers to pay what is justly due."

Deans vs. Robertson, 64 Miss., 195, 198
1 Pom. Eq. Jur., §§ 391, 402.
1 Story's Eq. Jur., § 642.

On any theory of the case that can be advanced by appellees, whether upon the equity questions involved or upon the merits of the contract, it is clear to me that appellees are not entitled to the relief sought, and I cannot but rely with confidence upon the mathematics of this case as well as the decisions; for it is as certain as that two and two make four that the results claimed by me are demonstrated

by the figures adduced in proof thereof; and in the interests of the parties and for the prevention of much future litigation I trust that this court will decide the questions involved in the contract itself upon the merits of the contract, and will not reverse the appellate court upon equity grounds only.

Respectfully submitted,

Wm C. White

Attorney for Appellant.

id

No. 66. Supt.

JAMES H. McKENNEY, Clerk.

REPLY OF APPELLANT.

Reply Brief of White for Appt.

Supreme Court of the United States.

Filed Oct. 24, 1898

October Term, 1898.

No. 66.

THE MISSOURI, KANSAS AND TEXAS TRUST COMPANY, - - Appellant,

vs.

THEODORE M. KRUMSEIG AND LOUISE M. KRUMSEIG, - - Appellees.

WILLIAM C. WHITE,
Attorney for Appellant.

DULUTH.
RICHARDSON PRINTING CO., PRINTERS,
1898.

Supreme Court of the United States

OCTOBER TERM, 1898.

THE MISSOURI, KANSAS AND TEXAS TRUST COMPANY, - - Appellant,

vs.

THEODORE M. KRUMSEIG AND LOUISE M. KRUMSEIG, - - Appellees.

APPELLANT'S REPLY BRIEF.

The learned counsel for the Appellees in the above entitled matter, seems to have found it necessary to search for some new method of meeting the questions raised by me upon the equity proposition that "He who seeks equity must do equity." He has therefore at this late hour discovered that his action is based upon Section 5817 of the General Statutes of the State of Minnesota, as follows: "An action may be brought by any person in possession, by himself or his tenant, of real property against any person who claims estate or interest therein, or liens upon the same, adverse to him for the purpose of determining such adverse claim, estate, lien or interest."

Proceeding upon this assumption the Counsel then wanders off into an argument intended to convey that if the contract in this case is a life insurance contract and void, the Appellees are entitled to have it set aside independently of any question of usuay for the reason that it constitutes a

cloud upon the plaintiff's title and that clouds upon titles may be removed under such circumstances without the necessity of resorting to the application of the rule in equity; for the State has by Legislation made the instrument such a cloud upon the title.

In the first place the Counsel is mistaken as to the action being in fact an action based upon Section 5817 of the General Statutes of 1894; that section of the statutes has been construed in the State of Minnesota and our courts have determined that a complaint similar to the old bill in equity to cancel the instrument claimed to operate as a cloud upon real estate cannot be treated as a complaint in an action under this statute; all that the complaint need allege of defendant under this statute is that he, (the defendant) claims some estate or interest in or lien on the land, without showing that the claim is invalid or that he (the defendant) does plaintiff any wrong in making it.

The plaintiff having proved his possession or the title and that the lands are vacant, the burden is then on the defendant to prove his adverse claim.

The Supreme Court of Minnesota holds that the position of the parties is the reverse of that held by them in an ordinary action, and in the case of Walton vs. Perkins, 28 Minn., 413, discusses a complaint similar to the one in this case in the following language:—"The complaint being manifestly one in the nature of a bill in equity to remove a specified cloud upon the plaintiff's title, burden is upon him to establish, first, his own title; second, the instrument claimed to be a cloud; third, the invalidity of such instrument.

"The issues tendered relate to these particulars. To allow Plaintiff to alter his complaint as one under the statute is to allow him to make his action one in which all he has to do in order to make a case, is to prove his own title (or possession) leaving defendant to establish his mortgage and its validity.

"The issues tendered in this complaint are entirely different, as respects burden of proof, from that tendered in the

action under the statute. The action being equitable, the issue which it tenders is that which such an action raises, and to allow him to obtain relief under a statutory action would be to allow him to obtain relief not within an issue tendered by him, and would operate as a surprise upon the defendant.

"We think, in order to put on a defendant the onus intended in the statutory action, it must appear from the complaint that the action is brought under the statute, so that he may know from it what he is required to do; and that a complaint clearly one in an action to remove the particular cloud upon real estate, cannot be treated as a complaint in an action under the statute, nor be held to be a good complaint, because the facts stated show that the plaintiff might bring an action under the statute."

The reasoning in this case applies directly to the case before us in which the plaintiff has alleged in his complaint that he is the owner in possession of the realty in question and that the instrument set up in the complaint is a mortgage upon said property and that by reason of facts further stated in the complaint such mortgage is an invalid instrument.

These might be reasons, if the pleading were otherwise sufficient, for allowing the plaintiff relief of the kind given him under the bill in equity to remove a cloud upon the title; but they are not such as will give him the right to relief under the statute in question.

But further than this, I contend that he has not here an action in the nature of a bill in equity to remove a cloud. His action is on the contrary based upon section 2217 of the Statutes of 1894 which reads as follows: "Whenever it satisfactorily appears to the court that any bond, bill, note, assurance, pledge, conveyance, contract, security or evidence of debt, has been taken or received in violation of the provisions of this act, the court shall declare the same to be void, enjoin any proceedings thereon, and shall order the same to be cancelled and given up."

The relief asked for is precisely the relief authorized in this section of the statutes, which is section 6 of the act of 1879 (Laws 1879 C. 66). Note the prayer of the complaint, which after setting up the title and possession in plaintiff and the execution of the mortgage, and its invalidity because based upon a usurious consideration and because containing an unauthorized life insurance contract, thereupon demands relief as follows: "That the said mortgage be cancelled of record, and that defendant be declared to have no interest in said mortgaged premises by virtue thereof, and that the defendant be permanently enjoined from taking any action or proceeding for the enforcement of the same or either of them, and that the said notes be cancelled and delivered up to the said plaintiffs."

This is precisely the relief provided for in section 2217 of the Statutes of 1894 and it is under this section that the counsel has sought to obtain relief. The issue between us is whether he can obtain equitable relief under that section of the statute without first offering to do equity; and whether the statute is not intended in fact to give the party a legal remedy in a case where suit having been begun upon a usurious contract, it is thereafter made to appear in the course of litigation that the contract or security is usurious in fact; it then being made the duty of the court to declare the same void, enjoin further proceedings thereon, and order it cancelled and given up.

The complaint in this action might possibly have been framed with a view to such relief as would be granted under a bill in equity to remove a cloud upon the title;

But if it were so intended it is wanting in averments, showing a necessity for the preventive interference of the court. There are no averments which in fact show necessarily that the mortgage constitutes a cloud, and there is no demand that the cloud upon the title be removed. The indication that there *might* be a cause of action of this nature is not sufficient.

Maloney vs. Finnegan, 38 Minn., 70.

It is too clear for argument to be necessary, that this is an action under Section 2217 as stated, and therefore the statement and argument on pages 2 to 7 of the Appellee's brief absolutely fails, because it is based upon hypotheses that are not warranted in this case. Plaintiff has here invoked the exercise of the peculiar powers of a court of equity, to declare forfeiture of an alleged usurious debt for which he has received a valuable consideration, and there is no relief asked excepting that prescribed by the statute in such case; our contention being, however, that even such relief cannot be had in a court of equity, but will be granted (if at all) only as a legal remedy in an action to enforce the contract or foreclose the security.

This I have fully discussed at pages 10-13 of my original brief herein. It is also familiar law that "when a party comes into a court of equity to remove a cloud upon the title to his land, he must do whatever it is equitable that he should do before the court will interfere," as stated by the court in the leading New York cased quoted in my original Brief.

Williams vs Fitzhugh, 37 N. Y., 444, 453.

I may be allowed to add a word in reference to the dedision of the Supreme Court of the State of Minnesota, in the case of Matthews vs. Missouri, Kansas and Texas Trust Co., 72 N. W. Rep., 121 (Minn.), referred to in counsel's brief at pages 16 and 26, with the statement that the Supreme Court therein refuses to reverse the former decision as to the non-applicability of the equity rule in usury cases, and with the further statement that the contract in the case at bar is the same contract passed upon in Minnesota heretofore, and that therefore the previous decisions are binding upon us in this case.

I submit in the first place, that an over-worked court has in the case of Matthews vs. Missouri, Kansas and Texas Trust Co., 72 N. W. R., 121, been contented to merely glance at the contract involved in the case; and finding it the same in form and substance as that involved in the case of Misouri, Kansas and Texas Trust Co. vs. McLachlan, 59 Minn., 468, has assumed that there could be no difference in the princi-

ples involved in the two cases, and has contented itself with a "per curiam" opinion to that effect without troubling itself in the least to see whether there were or were not distinguishing features between the two.

It also disposes of the equity question, with the off-hand statement that the statutes were correctly construed in Scott vs. Austin, 36 Minn., 460, without any reference whatever to my arguments based upon the Minnesota statute, and in which attempt was made to answer the prevailing and final opinion of the court in 36 Minn., 460, as I have attempted to do also in the case now at bar. It has seemed to me that the argument in the Matthews case, if fallacious, was at least of enough weight to entitle it to an answer from the court.

That there is a very obvious distinction between the case now at bar and the McLachlan case, I think I have fully shown in my original brief herein; and the same distinction existed in the Matthews case, although the Supreme Court dismissed it in a word, with the statement that it was unable to distinguish between the two. The distinction is clearly demonstrable as a mathematical problem, and my belief is unshaken, that if the court will look into and take the slight trouble to understand the mathematics of this case, it will agree with me that there is in the contract in question not the slightest color or taint of usury.

Respectfully submitted,

WM. C. WHITE,

Attorney for Appellant.